United States Court of Appeals

for the Second Circuit

APPENDIX

75-6101

73-2461

FILMED

75-6101

In The

United States Court of Appeals

For The Second Circuit

HERMAN DUARTE,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD,

Defendants-Appellees.

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS FILED DEC 10 1975 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

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HERMAN DURATE, VS. U.S.A. ET-ANO 1A JUDGE

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73 CIV. 2

73 CIV 2461

DATE	PROCEEDINGS
Jun4-73	Filed Complaint. Issued Summons
Jun22-73	Filed summons and entered marshal's return served on: U.S.A. by certified mail on Atty Gen Wash D.C. on 6-6-73 certified mail receipt no. 490420 & U.S. Coast Guard by Tyree Harris by certified mail on Atty Gen Wash D.C. certified mail #49020 and Gov. Island Bldg 125 Rm 101. on 6-6-73.
8-1-73	Filed defts. ANSWER to complaint.
Oct-9-73	Filed for Pltff. Notice to Take Deposition on 11/12/73 of Cmdr.Newman & Donald Cooper
Nov.5-73	Filed Notice oof Motion for Summary Judgt., returnable 11/26/73, and Affidavit.
Nov.5-73	Filed Memorandum of Law
Nov-28-73	Filed stip. and order that defts. motion for summary judgment is adj. to 12-24-73- Stewart, J.
Jan.4-74	Filed stip. and order that the time of pltf. to respond to defts. motion for summary judgment is ext. to Jan. 28,1974. So ordered, Stewart,J.
Jan.29-74	Filed stip. and order that the time of pltf. to answer defts. motion' for summaryjudgment is ext. to Feb. 11, 1974. So ordered, Stewart,
Feb-15-74	Filed pltf's affdvt. and cross-notice of motion for summary judgment - ret. March 11-74 at 10 AM
Feb-15-74	Filed pltf's memorandum of law in support of cross-motion for summary judgment
Mar.6-74	Filed stip. and order that the time of deft.s. to answer pltfs. cross motion for summary judgment is adj. to April 15,1974. So ordere Stewart,J.
Apr- 9-74	Filed deft's memorandum of law in opposition to pltf's motion for summary judgment and in support of deft's motion for the same.
Apr.9-74	Filed defts. statement under Rule 9(g).
4-8-75	Filed notice of motion for judgment on the pleadings ret. 4-24-75
4-8-75	Filed memorandum of law in support of defts' motion for judgment on the pleadings
04-22-75	Filed stip. and order adj. deft's return date for motion to 5-22-75.—Stewart, J.
05-20-75	Filed pltf's memorandum of law in opposition to defts. motion forfor judgment on the pleadings pursuant to tule 12(c)
06-12-75	Filed pltf. affdvt. and notice of motion for leave to file an amended complaint and for further releif as the Court seem just. 6-19-75.
06-17-75	Filed defts. memorandum of law in opposition to pltf's motion for leave to file an amended complaitn in the form annexed.
06-24-75	Filed Memorandum # 42543 Pltf. and defts. filed motions for summary judgment While motions were pending, defts agreed to return the document to pltf. and did so on 12-23-75. There are still pending, motions for summary judgment on on pltf's claim for damages, defts. moved for judgment on the pleading We can not say that defts. should be laible for monetary damages. Therefore, we grant defts motion for summary judgment and deny pltf's request for damages. So Ordered —Stewart, J. m/n
06-24-75	Filed Memo. End. on motion filed 6-12-75 by pltf. for leave to file amended complant Motion granted. So Ordered—Stewart, J. m/n
06-30-75	Filed JUDGMENT Defts. moved for summary judgment. Ordered that defts. United States of America and United States Cost Guard, Motion for summary judgment is granted, have judgment against pltf. Herman Durate, dismissing the complaint —clerk
07-11-75	Filed defts. memorandum of law in opposition to pltf's motion pursuant to rule 59
09-09-75	Filed Memo. endorsed on motion filed 7-3-75 Pltf's motion to reconsider its decision is granted. Upon reconsideration, however, we adhere to our original decision of 6-24-75—Stewart, J. m/n
*6-24-75	Filed AMENDED COMPLAINT.

(Continue on [illegible])

DUARTE, vs U. S. A. et-ano

STEWART, J.

2A

D. C. 110 Rev. Civil Docket Continuation

73CVI 2461

DATE	PROCEEDINGS	Date Ord Judgment
10-08-75	Filed pltf. notice of appeal to the U.S.C.A. for the Second Circuit from order entered on 6-24-75. and from order on reconsideration entered on 9-9-75 mailed copy Abraham E. Freedman	

61-51-3956

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD,

Defendants.

---

73 Civ. 2461 (CES)

NOTICE OF MOTION FOR SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Warren A. Schneider, sworn to on November 5, 1973, the exhibits thereto and all prior proceedings herein, the undersigned will move this Court at a Stated Term thereof for the hearing of motions, in the United States Court House, Foley Square, New York, N. Y., at 10:00 A.M. on November 26, 1973, or as soon thereafter as counsel may be heard, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, in favor of United States of America and the United States Coast Guard, without cost.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(e)(2) of the Rules of the United States District Court for the Southern District of New York, answering papers, if any, are required to be served upon the undersigned at least three days in advance of

the return date of this motion.

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PAUL J. CURRAN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza, Suite 4048
New York, N. Y. 10007
Tel. (212) 264-0480
Attorneys for Defendants

By _____
[redacted] A. SCHNEIDER

TO: ABRAHAM E. [redacted], Esq.
Attorney for Plaintiff
30 Seventh Avenue
New York, New York 10011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,

Defendants.

73 Civ. 2461 (CES)

STATEMENT UNDER RULE 9(g) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The material facts as to which defendants contend that there is no genuine issue to be tried are that:

1. That on October 5, 1972, plaintiff, Herman Duarte, was a Seaman serving on board SS AMERICAN [illegible].

2. That on that date he possessed Merchant Mariner's Document No. Z-749[illegible].

3. That on October 5, 1972, plaintiff was arrested by Vietnamese Police for violation of Vietnamese currency and narcotics laws.

4. That on October 14, 1972, plaintiff signed a document entitled "Voluntary Surrender Agreement," covering his Merchant Mariner's Document in lieu of an administrative hearing.

5. That on October 18, 1972, plaintiff, Herman Duarte, was found guilty by the Court of First Instance, Province of Binh-Binh, of a marijuana offense, and fined 5,000 Piastres.

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6. That at the present time, plaintiff's Merchant Marine Document has not been restored to him by the U.S. Coast Guard.

Dated: New York, N. Y.
November 5, 1973

PAUL J. CURRAN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Attorneys for Defendants

TO: ABRAHAM E. FREEDMAN, Esq.
Attorney for Plaintiff
96 Seventh Avenue
New York, New York 10011

WAS:f
61-51-5956

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD,

Defendants.

73 Civ. 2461 (CES)

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WARREN A. SCHNEIDER, being duly sworn, deposes and says:

1. I am trial attorney in the Admiralty and Shipping Section of the Department of Justice, New York Office, and am familiar with this case and the pleadings heretofore filed.

2. I make this affidavit in support of the Government's motion for summary judgment against plaintiff, Herman Duarte, seeking dismissal of plaintiff's complaint against the United States of America and the United States Coast Guard.

3. The case arises from the arrest of plaintiff, Herman Duarte, by the Vietnamese Police in Qui-Nhon, Republic of Viet-Nam, on October 5, 1972, for illegal possession of American currency and marijuana.

4. At the time of his arrest plaintiff, Herman Duarte, was a Messman on board the SS AMERICAN CHARGER, serving under Merchant Mariner's Document No. Z-749228.

5. On October 14, 1972, plaintiff, Herman Duarte, was advised by Commander Dorwin W. Newman, USCG, Officer-in-Charge of the Merchant Marine Detail, Saigon, Republic of Viet-Nam, that possession of marijuana was a violation

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of 46 U.S. Code 239, and the Regulations issued thereunder, and a finding that he did, in fact, possess such marijuana subjected him to revocation of his Merchant Mariner's Document pursuant to 46 C.F.R. § 137.03-5. Commander Newman informed plaintiff that he was entitled to a hearing before a Hearing Examiner as to whether or not he was guilty of the charge. He additionally advised plaintiff that in lieu of the hearing he could, if he so desired, voluntarily surrender his Merchant Mariner's Document.

6. Plaintiff, Herman Duarte, decided to voluntarily surrender the Document in lieu of the hearing procedures, and signed a voluntary Surrender Agreement in the presence of Commander Newman and Chief Petty Officer Donald S. Cooper, USCG.

7. On October 18, 1972, plaintiff, Herman Duarte, was found guilty by the Court of First Instance, Province of Binh-Dinh, of marijuana offenses, and fined 5,000 Piastres.

8. On November 13, 1972, Commander Robert D. Askew, Chief, Disciplinary and Security Branch, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, U.S. Coast Guard Headquarters, Washington, D.C., received a letter from counsel for plaintiff contending that the surrender of the Merchant Mariner's Document by the plaintiff was involuntary. Subsequent thereto, Commander Askew received the report of the circumstances of thesurrender from the Merchant Marine Detail in Saigon, and reviewed it to ascertain the validity of the voluntary surrender. His review convinced him that the actions of Commander Newman were in accordance with the regulatory provisions contained in 46 C.F.R. Part 137, and that the

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surrender was indeed voluntary and authorized by 46 C.F.R. 137.03-15(3). Counsel for plaintiff was so advised on January 18, 1973. 46 C.F.R. §137.03-5 provides that certain offenses, including "possession, use, sale or association with drugs, including marijuana," are offenses that would result in revocation of documents as such acts are of such a serious nature that they are deemed to "affect the safety of life at sea, the welfare of seamen or the protection of property aboard ship." 46 C.F.R. § 137.10-10 provides that an individual may surrender his Document in lieu of the hearing provided in the Regulations, and subparagraph (c) thereof provides that such voluntary surrender "should not be accepted by an investigating officer unless the investigating officer is convinced that the seaman fully realizes the effect of such surrender."

9. The following documents are submitted herewith to substantiate the statements made in this affidavit:

Government Exhibit A: Certified copies of 9 pages from the official records of the Office of Merchant Marine Safety, U. S. Coast Guard Headquarters, which includes certified entries from the official logs of the SS AMERICAN CHARGER, certification of Shipping Articles, concerning plaintiff, Herman Duarte, certified copy of the trial results from the Court of First Instance in Binh-Dinh, in Vietnamese and English translation, and photostatic copy of original Voluntary Surrender Agreement executed by plaintiff.

Exhibit B: Three letters consisting of certified copies from the Office of Merchant Marine Safety, Coast Guard Headquarters, of correspondence between counsel for plaintiff and Commander Askew.

Exhibit C:- Affidavit of Commander Derwin W. Kerman, U.S. Coast Guard, dated September 20, 1973.

Exhibit D: Affidavit of Chief Petty Officer Donald G. Cooper, U.S. Coast Guard, dated September 28, 1973.

Exhibit E: Affidavit of Commander Robert D. Askew, U.S. Coast Guard, dated October 1, 1973.

10. The facts submitted herewith clearly demonstrate that the actions of the U.S. Coast Guard in accepting plaintiff's voluntary surrender of his Merchant Mariner's Document in lieu of a hearing procedure were fully justified and in accordance with the regulatory provisions contained in Title 46, Code of Federal Regulations, and must be upheld by this Honorable Court as being within the jurisdiction of the agency.

WHEREFORE, it is respectfully requested that this Honorable Court decline to grant the injunctive and monetary relief demanded by plaintiff's counsel, and that the complaint be dismissed in all respects, and summary judgment granted to defendants, the United States of America and the United States Coast Guard.

Sworn to before me this
6 day of November 1973

WARREN A. SCHREIBER

GILBERT S. FLEISCHER
Notary Public, State of New York
No. 30-61-21[illegible]
Qualified in [illegible]
Certificate filed in [illegible]

OFFICIAL U.S. COAST GUARD RECORDS

11A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

MAILING ADDRESS:
U.S. COAST GUARD (GCAS/81)
400 SEVENTH STREET SW.
WASHINGTON, D.C. 20590
PHONE:

Date: 27 July 1973

TO WHOM THESE PRESENTS SHALL COME, GREETING:

I certify that the annexed nine (9) pages are true and correct copies of official records in my custody.

Custodian
R. D. ASKEW
Chief, Disciplinary & Security Branch
Merchant Vessel Personnel Division
Office of Merchant Marine Safety
U. S. Coast Guard

~~xxxxx xxDepartmentxx~~
I certify that the attesting officer above is the custodian or the original documents described above.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Department of Transportation to be affixed, on the day and year first above written.

By direction of the Secretary of Transportation:

E. S. WHITAKER
Chief Warrant Officer, U. S. Coast Guard
Chief, Military Personnel Action Branch
Administrative Services Division

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DEPARTMENT OF TRANSPORTATION, U. S. COAST GUARD
CGHQ-4562 (REV. 9-72)

CMI

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

12A

VOLUNTARY SURRENDER AGREEMENT

FILE

DATE 14 OCTOBER 1972

I, HERMAN DUARTE, Z/Bk 749228, being advised that I am currently under investigation by the Coast Guard for POSSESSION OF MARIJUANA ASHORE AT QUINHON, RVN

do hereby voluntarily surrender to the Coast Guard Merchant Marine ~~Inspection Office,~~ DETAIL Port of SAIGON, RVN my Merchant Mariner's Document ~~and~~ _____, in preference to appearing at a hearing under 46 USC 239 and/or 46 USC 239b to answer charges against me. I understand that I permanently relinquish all right to said Merchant Mariner's Document and Z-749228 and further, I hereby waive the right to a hearing, appeal and judicial review.

The above agreement has been read to me, and I fully understand its meaning.

[signature]
Signature

Merchant Mariner's Document Z/Bk Z-749228 and _____, received in accordance with the above surrender agreement this 14TH day of OCTOBER, 1972 by the U. S. Coast Guard Marine ~~Inspection Office,~~ DETAIL Port of SAIGON RVN

D. W. [signature], CDR, USCG
Investigating Officer

WITNESSED

[signature]

DEPT. OF TRANSP., USCG, CG-2639E (3-69)

GPO 964-099

OCMI

service
Central VN
Binh-Dinh
Court of First Instance

7313/BL

REPUBLIC OF VIET-NAM

Ministry of Justice

The Office of the Binh-Dinh Public Prosecutor

C E R T I F I E S:

that Mr. HERMAN DUARTE, born in 1930 in Texas, son Mr. EDWARD DUARTE and Mrs. DOROTHY DUARTE, has been fined to 5,000$ for using marijuana by the Court of First Instance in its Oct. 18, 72 session.

There is no other case concerning him pending in the Binh-Dinh Office of the Public Prosecutor.

This certificate is issued to him for all purposes.

Qui-Nhon, October 18, 1972
signed,
LE KHAC HY
Public Prosecutor

Certified copy
Qui-Nhon, Oct. 28, 72
signed,
Public Prosecutor

Translated by the Political Translation Unit at the American Embassy, Saigon, Republic of Vietnam.

HARRY M. CARTER, JR.
CONSUL
OF THE UNITED STATES OF AMERICA

...G-PHÀN
SƠ - THẨM
BÌNH - ĐỊNH

Số: 7.215/BL

VIỆT - NAM CỘNG - HÒA

BIỆN-LÝ TÒA SƠ-THẨM BÌNH-ĐỊNH

CHỨNG - NHẬN:

Ông Herman Duarte, sinh năm 1970 tại Tuxan, con ông Edward Duarte và bà Dorothy Duarte; bị Tòa Sơ-Thẩm Bình-Định tuyên phạt 3.000$ và về tội (sử dụng cần-sa) tại Phiên-Nhóm Tiền-Định ngày 18-10-1972.

Hiện giờ tại Biện-Lý Cuộc Bình-Định không có vụ hình nào liên-quan đến Her-man Duarte.

Nay cấp giấy này cho đương-sự tùy-nghi sử-dụng.

Qui-nhơn, ngày 19 tháng 10 năm 1972
BIỆN - LÝ,

Ấn ký LÊ - KHẮC-HY

SAO Y BẢN CHÍNH:
Qui-nhơn, ngày 28 tháng 10 năm 1972
BIỆN - LÝ,

VIỆT-NAM CỘNG-HÒA
BIỆN-LÝ
TÒA SƠ-THẨM BÌNH-ĐỊNH

LÊ - KHẮC-HY

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DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

15A

CERTIFICATION OF SHIPPING ARTICLES

NAME OF VESSEL/OFFICIAL NUMBER SS AMERICAN CHARGER, O.N. 291089	NAME OF OWNER OPERATOR United States Lines, Inc.
NAME OF MASTER George C. PREVILL, Lic. 386161	ADDRESS OF OWNER/OPERATOR One Broadway, New York, N.Y. 10004
NAME OF SEAMAN Herman DUARTE	DATE/PLACE OF BIRTH 1/12/30, Texas, USA
BOOK/Z NO. Z-749228	LICENSE NO. - - -
LINE NO. 47	CAPACITY Messman
NEXT OF KIN Dau: Deborah	ADDRESS OF NEXT OF KIN 950 Evergreen Ave. Bronx, New York 10472
DATE/PLACE SIGNING ARTICLES 8-25-72/Wilmington, N.C.	DATE/PLACE SIGNING OFF ARTICLES - - -
DATE/PLACE LEAVING VESSEL *	CAUSE OF LEAVING VESSEL *

OTHER PERTINENT INFORMATION:

*Apprehended by Province National Police, Qui Nhon, RVN, 5 OCT 1972, on charges of Currency and Narcotics Violations. Retained in Custody pending processing of charges by Judicial Police.

I HEREBY CERTIFY that I have seen the original, compared the above extract with it and found it to be a true and correct copy of entries pertaining to Herman DUARTE on the Shipping Articles of the SS AMERICAN CHARGER for a voyage commencing on 24 August 1972.

DATE OF CERTIFICATION	NAME OF INVESTIGATING OFFICER	SIGNATURE OF INVESTIGATING OFFICER
16 OCT 1972	D. W. NEWMAN, CDR, USCG	D. W. Newman

U. S. COAST GUARD
~~MARINE INSPECTION OFFICE~~
MERCHANT MARINE DETAIL
SAIGON, RVN
(Port)

DEPT. OF TRANSP., USCG, CG-2639H (8-70)

GPO 896-072

TRANSPORTATION DEPARTMENT
UNITED STATES COAST GUARD

CERTIFICATION OF OFFICIAL LOG BOOK

9 OCT 1972
0900 Hours
Qui Nhon, RVN

At 1734 Hours, 5 Oct 1972, MSC Qui Nhon advised by Radiotelephone that Herman DUARTE, Z 749228, Art. #47, Messman was arrested by the Vietnamese Police. At 1000 Hours, 7 Oct 1972, Master received copy of message sent to the U. S. Embassy, Saigon By John BOORS, APSA, OPS, Binh Dinh, stating that Herman DUARTE is in custody of the Binh Dinh Province National Police Command, and that charges of currency and Narcotics violations are being processed by the Judicial Police. He was Apprehended at 1400 Hours, 5 Oct 1972. The Master requested the OIC, MSCO, Qui Nhon and the Ship's Agent - Inshico, Qui Nhon - to notify the U. S. Coast Guard, Saigon and the American Consul, Saigon of this incident.

/s/ H. T. FERGUSON
Chief Officer

/s/ G. C. PREVILL
Master

I hereby certify that the above entries pertaining to Herman DUARTE on page(s) 23 Book No. 1 of the Official Log Book of the S. S. AMERICAN CHARGER for the voyage commencing 24 August 1972 is a true copy of the original. I certify that I have seen the original and compared the copy with it and found this to be a true copy.

16 October 1972
(Date of Certification)

D. W. NEWMAN, CDR ,USCG
NAME RANK
USCG MERCHANT MARINE DETAIL
SAIGON, REPUBLIC OF VIET NAM

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...CIAL LOG of the S.S. AMERICAN CHARGER

...e, hour, and place of entry ...d sea, give also latitude and ...gitude (See Section 202 on p. 19)	REQUIRED ENTRIES (See Pages 18 and 19) (Include the amount of any fine or forfeiture inflicted)
... Oct 1972 ...900 Hours Qui Nhon, RVN	At 1734 hours, 5 Oct 1972, MSC Qui Nhon advised by radiotelephone that Herman Duarte, Z 749228, Art. #47, Messman was arrested by the Vietnamese Police. At 1000 hours, 7 Oct 1972, Master received copy of message sent to the U.S. Embassy, Saigon by John Boors, APSA, CPS, Binh Dinh stating that Herman Duarte is in custody of the Binh Dinh Province National Police Command, and that charges of currency and narcotics violations are being processed by the Judicial Police. He was apprehended at 1400 hours, 5 Oct 1972. The Master requested the OIC, MSCO Qui Nhon and the ship's Agent - INSHICO Qui Nhon - to notify the U.S. Coast Guard, Saigon and the American Consul, Saigon of this incident.
[signature]	[signature]
CHIEF OFFICER	MASTER
... Oct 1972 1400 Hours Qui Nhon, RVN	Kurt L. Hobirk, Z 263 66 1196, Art. #12, A.B. was this date released from vessel for repatriation to the States as recommended by J.M. Hellman, M.D., Holy Family Hospital, Qui Nhon, RVN. Net wage voucher of one hundred thirty-seven dollars and eighty-seven cents ($137.87) covering base wages, ammo and area bonuses given Company Agents - Inshico, Qui Nhon due to U.S. currency restrictions in Vietnam. Accrued overtime to be paid by U.S. Lines, Inc. N.Y. City upon receipt of Voyage Sea Pay Roll.
[signature]	[signature]

N.B.—Every entry in this logbook required by the act must be signed by the master and by the mate or some other of the crew; and every entry ...ny illness, injury, or death must also be signed by the surgeon or medical practitioner on board (if any); and every entry of wages due to, or of ...e sale of the effects of a seaman or apprentice who has died must be signed by the master, the mate, and some other member of the crew.

CHIEF OFFICER MASTER

OFFICIAL LOG of the S. S. AMERICAN CHARGER 18A

Date, hour, and place of entry. If at sea, give also latitude and longitude (See Section 202 on p. 19)	REQUIRED ENTRIES (See Pages 18 and 19) (Include the amount of any fine or forfeiture inflicted)
14 Oct 1972 0900 Hours Qui Nhon, RVN	At 1115 hours, 13 Oct 1972, D. G. Coop U.S.C.G., Qui Nhon aboard to obtain information about Herman Duarte, Z Alt # 47, Messman, who was arrested Vietnamese Police 5 Oct 1972. Copy of List and previous log entry on Duarte CPO Cooper.
	At 1325 hours, 13 Oct 1972, Cdr. D.W. MMD Saigon, RVN aboard to investig case of Herman Duarte. At 1325 Hou day Herman Duarte aboard with pap Vietnamese Police Department, Qui N Duarte interviewed by Cdr. Newman. Cdr. Newman ashore accompanied by Purser/MPA J. Figueroa, to obtain copi translation of Duarte's papers from Department.
	At 1750 hours, 13 Oct 1972 Cdr. D.W. Newm advising Master that Herman Duarte mu before a Vietnamese court at a later da he will be back in the morning to take the ship. 1810 Cdr. Newman ashore Vess to get underway for night steaming as p instructions.
	At 0756 hours, 14 Oct 1972, Cdr. D.W. N aboard. 0844 Cdr. Newman ashore by Herman Duarte.

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A. Ferguson
CHIEF OFFICER

[signature]
MASTER

N.B.—Every entry in this logbook required by the act must be signed by the master and by the mate or some other of the of any illness, injury, or death must also be signed by the surgeon or medical practitioner on board (if any), and every entry o the sale of the effects of a seaman or apprentice who has died must be signed by the master, the mate, and some other member

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S.S. AMERICAN CHARGER

...ce of entry. ...also latitude and ... (See Section 202 on p. 19)	REQUIRED ENTRIES (See Pages 18 and 19) (Include the amount of any fine or forfeiture inflicted)
... OCT 1972 - ...UIN HON, RVN	ABOARD THIS DAY TO HAVE DUARTE, HERMAN Z-749228 ACCOMPANY ME ASHORE AND HE WILL BE ROOMED AND BOARDED AT HALV COMPOUND #1, QUINHON, RVN, AWAITING THE DAY WHEN HIS CASE WILL BE HEARD BY THE COURT. FOR HIS [illegible] [illegible] / COR, USCG. [illegible] SAILOR
14 Oct 1972 0900 Hours Qui Nhon, RVN	Herman Duarte, Z-749228, Art. #47, Messman, quartered ashore in this port while awaiting trial before Vietnamese Authorities on currency and narcotics violations, took bartlet his personal effects with him authorizing in writing Chief Steward Frank Zapata, Z-[illegible], [illegible] to take care of the remainder. Wage Voucher in the net amount of three hundred [illegible] dollars and twenty nine cents [illegible] 51.29 [illegible] Agents - Tashico, Qui Nhon - for disbursement of funds to Duarte as necessary. Voucher includes all earned wages for period 24 Aug - 5 Oct 1972; i.e. base wages, overtime, 10% ammo bonus and 100% area bonus.

by USCG

[illegible] ...ER

[illegible] MASTER

N.B.—Every entry in this logbook required by the act must be signed by the master and by the mate or some other of the crew, and every entry of any illness, injury, or death must also be signed by the surgeon or medical practitioner on board (if any), and every entry of wages due to, or of the sale of the effects of a seaman or apprentice who has died must be signed by the master, the mate, and some other member of the crew.

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S.S. AMERICAN CHARGER

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...place of entry. ...ive also latitude and ...de (See Section 202 on p. 19)	REQUIRED ENTRIES (See Pages 18 and 19) (Include the amount of any fine or forfeiture inflicted)
...0 OCT. 1972 1115 HOURS BANGKOK, THAILAND	David J. Calhoun, Z.597159, Art. #36, Fireman/Watertender landed at Apra, Guam for hospitalization, is hereby detached from vessel's Foreign Articles before a U.S. Consular Official at Bangkok, Thailand effective 23 Oct 1972. Net earned base wages in the amount of seventy four dollars and thirty nine cents paid Calhoun at time of landing. Overtime to be paid by U.S. Lines, Inc. N.Y.C. upon receipt of voyage sea pay roll.
20 OCT. 1972 1115 HOURS BANGKOK, THAILAND	Herma Duarte, Z 749228, Art. #47, Messman jailed in Qui Nhon, RVN on currency and narcotic violations charges, is hereby detached from vessels Foreign Articles before a U.S. Consular Official at Bangkok, Thailand effective 5 Sep 1972. Wage Voucher in the amount of, three hundred fifty one dollars and twenty nine cents ($351.29) covering all earned wages left with U.S. Lines, Inc. Agents, Ishico, Qui Nhon for disbursement to Duarte in local currency as the need may arise.
[signature] PURSER	[signature] MASTER

N.B.—Every entry in this logbook required by the act must be signed by the master and by the mate or some other of the crew; and every entry ...ry illness, injury, or death must also be signed by the surgeon or medical practitioner on board (if any); and every entry of wages due to, or of ...ale of the effects of a seaman or apprentice who has died must be signed by the master, the mate, and some other member of the crew.

U.S. COAST GUARD CORRESPONDENCE

21A

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Address reply to:
COMMANDANT (CAS)
U.S. COAST GUARD
WASHINGTON, D.C. 20591

Date: 27 July 1973

TO HOM THESE PRESENTS SHALL COME, GREETING:

I c t the annexed three (3) letters consisting of five pages are true a ect copies of official records in my custody.

Custodian
R. D. ASKEW
Chief, Disciplinary & Security Branch
Merchant Vessel Personnel Division
Office of Merchant Marine Safety
U. S. Coast Guard

[redacted] certi that the attesting officer above is the custodian of the rigina ocuments described above.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Transportation to be affixed, on the day and year first above written.

By direction of the Secretary of Transportation:

E. S. WHITAKER
Chief Warrant Officer, U. S. Coast Guard
Chief, Military Personnel Action Branch
Administrative Services Division

DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD
CGHQ-4562 (REV. 10-70)

ABRAHAM E. FREEDMAN
COUNSELLOR AT LAW AND PROCTOR IN ADMIRALTY
36 SEVENTH AVE., NEW YORK, N. Y. 10011
925 8410

PHILADELPHIA, PA OFFICE
FREEDMAN, BOROWSKY AND LORRY
CHESTNUT STREET AT FIFTH
WALNUT 5-8400

CAPPIELLO, JR.

U S COAST GUARD
NOV 15 1972
WASHINGTON, D. C.
MERCHANT VESSEL PERSONNEL

November 8, 1972

U.S. Coast Guard (GMVP-3)
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: Herman Duarte - Z749228

Gentlemen:

Please be advised that this office represents the above named seaman. The purpose of this letter is to request the return to Mr. Duarte of his seaman's document and, if deemed appropriate, the preference of charges against him for whatever misconduct the Coast Guard alleges he engaged in.

It is our contention that the circumstances surrounding the alleged "voluntary" surrender of his document are such that Mr. Duarte was clearly deprived of all semblance of due process of law and his constitutional rights.

It is not our intention at this time to go into the merits of any possible charges which may be brought against him. The sole purpose of this letter is to indicate to your office that he could not possibly have comprehended the nature of the surrender and that in any case the request for the surrender was untimely since it preceded the adjudication of the matter for which Mr. Duarte was charged.

The facts as we understand them are as follows. Mr. Duarte while going ashore was placed under arrest for alleged possession of marijuana cigarettes. He was incarcerated without access to either an American consul or to an attorney or a union representative or any other person who was in a position to advise him as to his rights. This incarceration lasted approximately 8 days. Subsequent to this incarceration he was given a date for trial of October 18, 1972. On October 14, 1972 one day after his release

November 8, 1972

Re: Duarte

from jail, while still in a state of confusion and shock, he was induced to sign the alleged voluntary permanent surrender of his document. In other words this surrender was taken before there was even an adjudication of the charge against him.

Subsequently he went to trial in a Vietnamese court, without the benefit of an interpreter, without the benefit of counsel or any other representation, without the slightest understanding of the nature of the proceedings. It was explained to him that if he paid a modest fine he could return to his ship and that would be the end of it.

The Coast Guard officer in charge, after learning of the disposition of the judicial proceedings refused to return Mr. Duarte's document to him claiming that he would now have to wait 3 years before he could make application for its return.

It is respectfully submitted that the circumstances of this permanent voluntary surrender are outrageous and can only result in a lack of confidence on the part of American seamen in the United States Coast Guard.

If, in fact, there is a basis for any charge against Mr. Duarte he is prepared to face these charges asking only that he be accorded his constitutional right to be represented by counsel and to be properly apprised of the nature of the proceedings.

For the foregoing reasons it is respectfully requested that Mr. Duarte's document be promptly returned to him, in care of the undersigned, and we guarantee his appearance and are authorized to accept any charges if in your discretion, you feel that such charges are warranted.

Very truly yours,

ABRAHAM E. FREEDMAN

NRP:lr

By Ned R. Phillips

.24A

(GMVP-3)

202 426-2215

5952
15 November 1972

Abraham E. Freedman
Counsellor at Law and Proctor in Admiralty
36 Seventh Avenue
New York, New York 10011

Attention: Mr. Ned R. Phillips

Gentlemen:

This is in response to your letter of 8 November 1972 concerning the voluntary surrender of U. S. Merchant Mariner's Document Z-749 228 by Mr. Herman Duarte on 14 October 1972, at Saigon, RVN.

The full details of the reported arrest, trial, and surrender, are not yet available to this Headquarters. They have been requested, by the most expeditious means, and upon receipt a determination will be made regarding your request for the return of Mr. Duarte's Merchant Mariner's Document. You will be advised as soon as possible.

Sincerely,

R. D. ASKEW
Lieutenant Commander, U. S. Coast Guard
Chief, Disciplinary and Security Branch
Merchant Vessel Personnel Division
By direction of the Commandant

Copy to:
MMD, Saigon

Mailed: 15 November 1972 (kl)

L. A. JOHNSON, Jr.

ONLY COPY AVAILABLE

(GMVP-3)

202 426-2215

5952
18 January 1973

Mr. Abraham E. Freedman
Counsellor at Law and Proctor in Admiralty
36 Seventh Avenue
New York, New York 10011

Attention: Mr. Edward M. Kaye

Dear Sir:

This is in response to your letters of 8 November 1972 and 10 January 1973, and is intended to complement my letter of 15 November 1972, concerning Mr. Norman Duarte.

In answer to your allegation that the Coast Guard is illegally holding the U. S. Merchant Mariner's Document of Mr. Duarte, the following information and sequence of events are set forth for clarification of the matter.

On 5 October 1972 Mr. Duarte, who was serving as a messman aboard the SS AMERICAN CHARGER under the authority of Merchant Mariner's Document Z-749 228, was apprehended at Qui Nhon, RVN, by the Binh Dinh Province National Police for violation of the Vietnam narcotic laws. On the same date he was jailed by the Binh Dinh Security Section. He was released on bail on 13 October 1972 after having been summoned to appear in the Court of First Instance of Binh Dinh, RVN. On 18 October 1972 Mr. Duarte appeared before the Court of First Instance at Binh Dinh and was arraigned on a charge of possession of marijuana cigarettes. Among others present at the Court were the Ship's Agent, representing the owner of the SS AMERICAN CHARGER, and two members of the U. S. Coast Guard, who witnessed the entire arraignment, pleading and sentencing. Their statements reveal that the Judge read the charges to Mr. Duarte in Vietnamese while an interpreter, who spoke perfect English, translated. Mr. Duarte was told of the charge of possession of marijuana cigarettes and asked by the Judge, through the interpreter, if the charge was true. Mr. Duarte replied, "Yes, sir." The Judge then asked Mr. Duarte if he knew what the penalties were for possession of marijuana in Vietnam. Mr. Duarte replied, "No, sir." The Judge then advised Mr. Duarte that he could be sentenced to one to five years for possession of marijuana and a longer time for selling marijuana. The Judge then advised Mr. Duarte he would be fined 5,000 piasters. When asked if he could pay the fine, Mr. Duarte replied, "Yes, sir. Thank you very much." On the same date, after payment of the 5,000-piaster fine for possession of marijuana, Mr. Duarte was released by the Court.

L. Freedman 18 January 1973

The U. S. Coast Guard Merchant Marine Detail, Saigon, RVN, was notified by the United States Embassy of Mr. Duarte's arrest and confinement. Mr. Duarte was interviewed by the Merchant Marine Detail Officer, Saigon, on 14 October 1972, following his release on bail. He was advised that the Coast Guard had conducted an investigation into the case and that he was amenable to action under the provisions of Revised Statute 4450, looking to the revocation of his Merchant Mariner's Document for possession of marijuana while serving under the authority of his document. After Mr. Duarte's rights and the nature of the charge that could be preferred were fully explained, he elected to surrender his Merchant Mariner's Document to avoid a hearing on the charge under R.S. 4450. It should be noted that this surrender was effected prior to Mr. Duarte's conviction by the Vietnam Court and was based solely upon his possession of marijuana while serving under the authority of his Merchant Mariner's Document. The Voluntary Surrender was accepted by the Coast Guard under the provisions of Section 137.05-15(5), Title 46, Code of Federal Regulations.

In view of the probative evidence in this case and the governing law and regulations, this Headquarters sees no valid reason to disturb the Voluntary Surrender Agreement. Mr. Duarte may, after three years from 14 October 1972, apply for a new Merchant Mariner's Document under the provisions of Subpart 137.13, Title 46, Code of Federal Regulations.

Sincerely,

R. D. ASKEW
Lieutenant Commander, U. S. Coast Guard
Chief, Disciplinary and Security Branch
Merchant Vessel Personnel Division
By direction of the Commandant

MAILED: 23 Jan. 73 (kl)

GLMI/81

L.A.Johnson:kl

CJM 2

AFFIDAVIT OF CDR DORWIN W. NEWMAN

Officer in Charge
Marine Inspection
124 Camp St., Rm. 201
New Orleans, La. 70130

MP-364

AFFIDAVIT OF CDR DORWIN W. NEWMAN, (6118) 573-30-6196 USGL

I hereby declare that all facts related in this affidavit are based upon my direct personal knowledge of the events and circumstances involved. My Coast Guard duty assignment and general responsibilities during the time the events described below occurred was as follows:

Officer in Charge of the Merchant Marine Detail, attached to the Consulate Section, Saigon, Republic of Viet Nam. My duties consisted of assisting the Consul in investigating acts of misconduct by American Merchant Seamen in my area of responsibility, which was the Republic of Viet Nam and the Kingdom of Thailand. I examined American flag vessels in order to determine that they were in compliance with their certificate of inspection. Investigated marine casualties and accidents including deaths, and injuries of Merchant seamen. In summation, I was detailed to the enforcement of vessel inspection, navigation and seamen's laws in general, and submission of these investigations to the appropriate investigating section of the Marine Inspection Office for such action as deemed necessary.

STATEMENT OF FACTS SURROUNDING THE VOLUNTARY SURRENDER OF SEAMAN HERMAN DUARTE's MERCHANT MARINER's DOCUMENT:

Seaman Duarte's case first came to my attention when the Consulate Section of the U. S. Embassy, Saigon, received a message from the American Advisor to the Vietnamese police in Binh Dinh Providence, that a seaman was in the custody of the national police for currency and narcotics violation. Chief Cooper, Officer in Charge, Explosive Loading Detail, Quinhon, RVN, boarded Mr. Duarte's vessel, at my direction, to obtain additional facts into the matter of his arrest. I arrived from Saigon this same day and boarded the vessel.

Seaman Duarte returned to the vessel and I interviewed him as to his misconduct and he provided me documents that were in Vietnamese. The vessel's agents obtained a translated copy of the documents for me and these papers stated that Mr. Duarte was

MIO, New Orleans, La. affidavit of CDR D. W. Newman, USCG

to appear for trial at a later date.

Seaman Duarte left his vessel on the day of its departure in order that he would be present at his trial for illegally bringing marijuana into Viet Nam. As an assist to this seaman, arrangements were made by Chief Donald Cooper for him to stay at his military compound in Quinhon, RVN, at little or no cost to Mr. Duarte. Mr. Duarte was driven to the compound accompanied by myself and Chief Cooper. After having been checked in and billeted, Mr. Duarte, Chief Cooper and myself went to Chief Cooper's room.

Mr. Duarte was advised, while Chief Cooper was in attendance, that he was currently under investigation for illegal possession of marijuana in Viet Nam. He was appraised that in preference to appearing at a hearing conducted by the Coast Guard upon his return to the United States, he could voluntarily surrender his Merchant Mariner's Document. I read the voluntary surrender agreement, with Chief Cooper in attendance, to seaman Duarte. He also took the necessary time to read the document himself before signing the agreement.

Seaman Duarte appeared neither intoxicated nor fatigued and in full control of his senses. He conducted himself in a normal manner. appearing to comprehend all that was first read and told to him. There was never any question in my mind as to this being anything other than a voluntary act to sign the agreement by Mr. Duarte, and that it was his firm desire to voluntarily surrender his document.

The last and final contact I had with seaman Duarte was his appearing at the Consulate Section, Saigon, in company with the vessel's agents, for a letter of introduction to obtain an exit visa from the Vietnamese Government.

SIGNED, SWORN AND ATTESTED TO BEFORE ME THIS DATE, 9/20/73

William E. Heath

WILLIAM E. HEATH, CDR, USCG,
6068 (229 14 9667)
By authority of 14 USC 636

Dated: 20 SEPT 1973 Signed: Dorwin W. Newman

DORWIN W. NEWMAN, CDR, USCG

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

MAILING ADDRESS:
U.S. COAST GUARD
400 SEVENTH STREET SW.
WASHINGTON, D.C. 20590
PHONE:

ENC Donald G. Cooper
U.S.C.G.C. Pt. Baker
P. O. Box 667
Port Aransas, Texas
78373

AFFIDAVIT of Donald G. COOPER, Chief Petty Officer,
U. S. Coast Guard

I hereby declare that all facts related in this affidavit are based upon my direct personal knowledge of the events and circumstances involved. My Coast Guard duty assignment and general responsibilities during the time the events described below occurred were as follows:

While serving in the Republic of South Viet Nam in the town of Qui Nhon, Binh Dinh Province, I was assigned as Officer in Charge of U. S. Coast Guard Explosive Loading Detachment Number Three, which involved the supervising, advising, and handling of all ammunition, explosives, and dangerous materials present in Binh Dinh Province.

Because of poor communications with the aforementioned Province, I was also directed to make communications with, assist, and make verbal reports to the Merchant Marine Detachment in Saigon, R.V.N., concerning problems (health, injury, complaints, and disciplinary) with Merchant Marine personnel, or any communications that such personnel wished to make.

STATEMENT OF FACTS SURROUNDING THE VOLUNTARY SURRENDER OF SEAMAN HERMAN DUARTE's MERCHANT MARINERS' DOCUMENT:

At approximately 1430 hours, 5 October 1972, I was informed by telephone conversation with BMC Michael Larkin (Military Sea Command, Qui Nhon R.V.N.) that Herman Duarte had been arrested by Vietnamese Civilian Police on charges of possession of narcotics and possession of U. S. currency. At 1445 hours, I attempted to inform Merchant Marine detachment Saigon R.V.N. of said incident. Communication with Saigon was impossible by telephone. At 0800, 6 October 1972, I called the Merchant Marine detachment Saigon, R.V.N. and informed Commander Newman of Duarte's arrest and detainment by Vietnamese Civilian Authorities.

To the best of my knowledge, on 14 October 1972, Mr. Duarte was released from confinement by Vietnamese Civilian Authorities.

Shortly after Mr. Duarte's release, I was informed by the Ishico shipping agent and Commander Newman that Mr. Duarte had a trial date and would not be able to accompany the ship if it left Qui Nhon before his trial date. I then offered to obtain quarters and subsistence facilities for Mr. Duarte. Mr. Duarte was quartered and subsidised at no cost to him or his company at MAC V Compound Number One, Qui Nhon, R.V.N.

I was present when Mr. Duarte was interviewed concerning his arrest for possession of marijuana by CDR Newman. Conditions of the surrender of his document were read to him and he voluntarily surrendered the document in my presence and signed the surrender agreement. He appeared to me to be in a sound state of mind, rational and there was no promise or threat made to Mr. Duarte to induce him to sign anything.

I was present also at the trial held on Mr. Duarte along with BM1 Crowley, USCG, and the shipping agent representing the ship. The judge read the charges in Vietnamese while an interpreter, who spoke perfect English, translated. Mr. Duarte was told that he was charged with possession of four (4) marijuana cigarettes. He was then asked by the judge through the interpreter if these charges were true. Mr. Duarte replied, "Yes sir". Judge asked through the interpreter how long has he been smoking marijuana. Duarte replied, "I don't smoke marijuana". Judge asked, "Why do you have marijuana in your possession?" Duarte replied, "He didn't know it was marijuana". Judge asked if he knew what the penalties were in Viet Nam for possession. Duarte replied, "No sir". Judge told him he could get one to five years for possession and a longer time for selling marijuana. Judge replied, "I am going to fine you 5,000 piasters". He then asked Duarte if he could pay that fine. Duarte replied, "Yes sir, thank you very much". That terminated the trial.

The above constitutes everything that I know of the event.

Date: 9-28-73 Signed: Donald G. Cooper

Donald G. Cooper

SIGNED, SWORN AND ATTESTED TO BEFORE ME THIS DATE.

C.W. Parker 9/29/73

C.W. Parker, CWO, GRUCOM

AFFIDAVIT OF ROBERT D. ASKEW, COMMANDER, U. S. COAST GUARD

I hereby declare that all facts related in this affidavit are based upon my direct personal knowledge of the events and circumstances involved. My Coast Guard duty assignment and general responsibilities during the time the events described below occurred was as follows:

Chief, of the Disciplinary and Security Branch, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, U. S. Coast Guard Headquarters, Washington, D. C. Part of my job as Branch Chief, involves the review of actions taken against documents and/or licenses of merchant seamen, and the recording of such information in the disciplinary records of seamen.

STATEMENT OF FACTS

On 13 November 1972, the Disciplinary and Security Branch received a letter dated 8 November 1972 from Mr. Ned R. Phillips, Esq. of the law firm of Abraham Freedman, New York which set forth the facts, as known to them, surrounding the Vietnamese conviction of Mr. Duarte as well as the surrender of his document to the Coast Guard. The letter raised issues which need not be addressed here but challenged the propriety of a voluntary surrender under the circumstances existing at the time.

Since the Branch was not then in possession of information upon which to base an adequate response, we requested full details from the Merchant Marine Detail, Saigon. The law firm representing Mr. Duarte was apprized of this action by our letter of 15 November 1972.

On 19 December 1972, the complete report was received by this Branch from the Merchant Marine Detail, Saigon. A study of the

AFFADAVIT OF ROBERT D. ASKEW, COMMANDER, U. S. COAST GUARD (Cont'd)

evidence in the case, giving due consideration to the issues raised by counsel in his letter of 8 November 1972, convinced me that the Coast Guard Investigating Officer had acted properly in the matter and within the scope of his authority and further within the purview of the regulations surrounding such an action. The evidence indicated to me, beyond any question, that the surrender was indeed a voluntary one and authorized by Section 137.05-15(5), Title 46, Code of Federal Regulations. On 18 January 1973, we wrote the law firm representing Mr. Duarte, furnishing the facts as known to us which are supported by documentary evidence, and affirmed the voluntary surrender. This letter was cleared through the Maritime and International Law Division, Office of the Chief Counsel, prior to its mailing.

R. D. ASKEW, CDR, USCG

(Date)

Signed, sworn and attested to before me this date, 1 OCT 1973

J. C. CARLTON, CDR, USCG
379 24 7026
By authority of 14 USC 636

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE, Plaintiff, -against- UNITED STATES OF AMERICA AND UNITED STATES COAST GUARD, Defendant.	CROSS-NOTICE OF MOTION FOR SUMMARY JUDGMENT Index #73 Civ. 2461 (CES)

TO:

PAUL L. CURRAN
United States Attorney
Gilbert S. Fleischer
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza, Suite 4048
New York, New York 10007

Filed - Unit 5 2/15/74 SHK

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward M. Katz, sworn to the 31st day of January, 1974, the affidavit of Herman Duarte sworn to the 31st day of January, 1974 and the affidavits and exhibits attached to defendants' papers in support of their motion for summary judgment, the undersigned will cross-move this Court at a slated term thereof for the hearing of motion, in the United States Courthouse, Foley Square, New York, New York at 10:00 a.m. on February 11, 1974 or as soon thereafter

as counsel may be heard, for summary judgment pursuant to Rule 56 Federal Rules of Civil Procedure, in favor of plaintiff.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 9(c)(2) of the Rules of the United States District Court for Southern District of New YOrk, answering papers, if any, are required to be served upon the undersigned at least three days in advance of the return date of this motion.

ABRAHAM E. FREEDMAN

By _____
Attorney for Plaintiff
346 West 17th Street
New York, New York 10011

January 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE, Plaintiff, -against- UNITED STATES OF AMERICA AND UNITED STATES COAST GUARD, Defendants.	73 Civ. 2461 (CES)

STATEMENT UNDER RULE 9(g) IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The material facts as to which plaintiff contends that there is no genuine issue to be tried are:

1. On October 25, 1972 plaintiff, Herman Duarte, was a messman serving aboard the S.S. "American Challenger."

2. On said date he possessed Merchant Mariner's Document No. Z-749228.

3. On October 5, 1972, plaintiff was arrested by the South Vietnames Police for violation of Vietnamese currency and narcotics laws, although plaintiff denies such violations.

4. On October 14, 1972 plaintiff signed a document entitled "Voluntary Surrender Agreement" pertaining to his Merchant Mariner's Document in lieu of an administrative hearing, although plaintiff denies that he fully comprehended his rights at that time.

5. On October 18, 1972 plaintiff was fined, 5000 Piastres by a Vietnamese Court for use of marijuana.

6. That plaintiff's Merchant Mariner's Document has not been restored to him despite due demand for same.

7. That since October 14, 1972 plaintiff has been unable to earn his living at sea.

8. That as appears from the affidavits of Herman Duarte, Commander Dorwin W. Newman and Chief Petty Officer Donald G. Cooper, Mr. Duarte was not fully advised of the various alternatives available to him prior to his signing the voluntary surrender agreement.

9. Specifically, plaintiff was not advised of the possible consequences of his choosing to face a hearing before the United States Coast Guard in the United States as opposed to signing the voluntary surrender agreement.

10. Plaintiff was not advised that if he chose to face a hearing before an Administrative Law Judge on charges of possession of four marijuana cigarettes as opposed to signing the voluntary surrender agreement and if found guilty the Judge might impose a sentence less than revocation of his document pursuant to 46 CFR §137.03-4.

Dated: New York, New York
February 7, 1974

ABRAHAM E. FREEDMAN

By _____
Attorney for Plaintiff
346 West 17th Street
New York, New York 10011

TO:
Paul J. Curran
U.S. Attorney
Gilbert A. Fleischer
Attorney in Charge
Admiralty Shipping Section
Department of Justice
26 Federal Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE, Plaintiff, -against- UNITED STATES OF AMERICA AND UNITED STATES COAST GUARD, Defendants.	COUNSEL'S AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SAME 73 Civ. 2461 (CES)

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

Edward M. Katz, being duly sworn, deposes and says:

1. I am an attorney in the offices of Abraham E. Freedman, counsel for plaintiff, and am wholly familiar with all the pleadings and proceedings heretofore had herein.

2. Upon information and belief, on October 5, 1972 plaintiff was serving as messman aboard the S.S. "American Charger" which was then at anchorage off Qui-Nhon, Republic of South Vietnam.

3. Upon information and belief on said date plaintiff was arrested ashore for illegal possession of American currency and marijuana. He was confined to a Vietnamese prison from October 5 to October 13, 1972 at which time he was released pending trial. During his confinement he met only one person who spoke any English, and even that meeting was a very short one.

4. On October 14, 1972 at the instigation of Commander D.W. Newman of the United States Coast Guard plaintiff signed an agreement voluntarily surrendering his Merchant Mariner's document.

5. Upon information and belief plaintiff had in his possession at the time of his arrest 4 marijuana cigarettes.

6. Upon reading the affidavits of Commander Newman and Chief Petty Officer Donald G. Cooper, it is clear that prior to his signing the Voluntary Surrender Agreement neither of them advised Mr. Duarte as to any of his rights at any possible hearing.

7. Those same affidavits make clear that Mr. Duarte was not advised of the possible consequences following a conviction at a hearing. Specifically he was not advised that pursuant to 46 CFR §137.03-3 if his possession or use of marijuana was found by the Administrative Law Judge to have been the result of experimentation and if he submitted evidence that such action will not recur, the Judge might enter an Order less than revocation.

WHEREFORE, your deponent respectfully requests that defendants' motion for summary judgment be denied; that plaintiff's cross-motion for summary judgment be granted and that the action be set down for trial on this issue of plaintiff's damages.

Edward M. Katz

Sworn to before me this
31st day of January, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE, Plaintiff, -against- UNITED STATES OF AMERICA AND UNITED STATES COAST GUARD, Defendants.	AFFIDAVIT OF HERMAN DUARTE IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SAME

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

Herman Duarte, being duly sworn, deposes and says:

1. I am the plaintiff in this action.

2. On October 5, 1972 I was serving as messman aboard the S.S. "American Charger" then anchored off Qui Nhon, Republic of South Vietnam.

3. On that date I went ashore alone by means of a launch service operated by local citizens.

4. When the launch docked at the pier a worker wanted me to give him some American cigarettes. I did so and was given what I believed to be 4 Vietnamese cigarettes.

5. At the gate local customs officials searched me and found the 4 cigarettes which they claimed contained marijuana.

6. Despite my protestations of innocence I was arrested and confined ashore in very poor conditions from October 5 to October 13, 1972.

7. During my confinement I could not drink any water for fear of disease, the conditions were filthy and I saw only a United States State Department representative for one shore visit on October 5, 1972. Other than this person I saw and spoke to no one who understood the English language.

8. On October 13, 1972 I was released and told by the prosecutor that I did not have to return for trial. I assumed that for all practical purposes the matter was being dropped.

9. Upon returning to the S.S. "American Charger" that day I was confronted by the Master and Commander Newman of the United States Coast Guard. That evening the Master sent word that I would have to return ashore since the trial was set for October 18, 1972.

10. On October 14, 1972 while ashore I saw Commander Newman in the presence of a Chief Petty Officer. At the time I was still in a state of confusion brought on by my arrest, incarceration for 9 days and the events set forth in paragraph 6 through 9 of this affidavit.

11. I signed the Voluntary Surrender Agreement appended to defendants' motion papers as Exhibit A. However, I did not fully comprehend what I was doing.

12. I have been a seaman for 26 years and have earned my living solely at sea during that time. Prior to October 5, 1972 I never had my Merchant Mariner's document suspended or revoked except for one incident in 1951. I was completely unfamiliar with the nature of a Coast Guard hearing and my rights thereunder. I was unaware of the various alternatives available to the Administrative Law Judge upon sentencing even were I convicted.

13. At no time prior or subsequent to my signing the Voluntary Surrender Agreement on October 14,1972 was I advised by Commander Newman concerning my rights as set forth in 46 CFR 137.05-25(e).

14. Further, I was not advised that in accordance with 46 CFR 137-03-4 that even if I were found guilty my Merchant Mariner's document need not be automatically revoked.

15. Without receiving the advice set forth in the two preceding paragraphs and considering my mental frame of mind at the time I do not believe that the surrender of my document was "voluntary" in any real sense.

16. On October 28, 1972 I appeared before a local court in South Vietnam. I did not have the assistance of counsel. I did not speak the Vietnamese language in which the proceedings were conducted. I did not receive a contemporaneous translation into English of the proceedings. To the best of my recollection I did not plead to the offense charged. Rather, I remained mute and was fined 5000 Piastres which was paid by the shipping company's agent. I requested Commander Newman to return my Merchant Mariner's document but he refused.

17. Upon being repatriated to the United States I consulted the law firm of Abraham E. Freedman about obtaining my document back and am advised that by letter of November 8, 1972 to the United States Coast Guard in Washington this request was made. Upon information and belief this request was denied on January 18, 1973.

18. I have sought shoreside employment thereafter without much success and have therefore lost wages for approximately 16 months to date.

WHEREFORE, I respectfully request that my motion for summary judgment be granted; that defendants' motion for same be denied and that the action be set down for a trial on the issue of damages.

Herman Duarte

Sworn to before me this
31st day of January, 1974

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

INDIVIDUAL VERIFICATION

deponent is the , being duly sworn, deposes and says that read the foregoing in the within action; that deponent has the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and and knows the contents thereof; that belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 197

ONLY COPY AVAILABLE

STATE OF NEW YORK, COUNTY OF NEW YORK

Lillian Rosenzweig

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the 14th day of February, 1974 deponent served the within CROSS-NOTICE, AFFIDAVITS, e

upon PAUL J. CURRAN U.S.ATTORNEY:GILBERT S. FLEISCHER ATT.in Charge defendants

in this action, at 26 Federal Plaza, Suite 4048, N.Y.

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 14th day of February, 1974

Edward M. Katz

Lillian Rosenzweig

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 197 at No.

upon deponent served the within

the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 197

WAS:f
61-51-5956

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,

Defendants.

73 Civ. 2461 (CES)

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

S I R :

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PLEASE TAKE NOTICE that upon the pleadings filed herein, and all prior proceedings herein, the undersigned will move this Court before the Honorable Charles E.Stewart, in the United States Court House, Foley Square, New York, N.Y., at 10:00 A.M. on April 24, 1975, or as soon thereafter as counsel may be heard, for judgment on the pleadings, pursuant to Rule 12(c), Federal Rules of Civil Procedure, dismissing plaintiff's complaint against the defendants.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c)(2) of the Rules of the United States District Court for the Southern District of New York, answering papers, if any, are required to be served upon the undersigned at least three days in advance of the return date of this motion.

Dated: New York, New York
April 8, 1975

Yours, etc.

ONLY COPY AVAILABLE

PAUL J. CURRAN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
U.S.Department of Justice
26 Federal Plaza, Suite 4048
New York, N. Y. 10007
Tel. 212 264 0480
Attorneys for Defendants

By S/
WARREN A. SCHNEIDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ONLY COPY AVAILABLE

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA,
UNITED STATES COAST GUARD,

Defendant.

AMENDED COMPLAINT

73 Civ. 2461 (CES)

ONLY COPY AVAILABLE

Plaintiff, Herman Duarte, by his attorney, Abraham E. Freedman, complaining of the defendants alleges as follows:

1. Plaintiff is an individual residing in the City and State of New York, County of Bronx.

2. Defendant, United States of America is a sovereign. Defendant United States Coast Guard is an agency established pursuant to the laws of the United States of America.

3. Jurisdiction of this Court is founded upon 28 U.S.C. §1346(a)(2) and the Fifth Amendment of the Constitution of the United States.

4. On October 5, 1972, plaintiff, a merchant seaman, was serving under his merchant mariner's document No. Z-749228 aboard the S.S. "American Charger," a vessel owned and operated by United States Lines,Inc.

5. On said date the S.S. "American Charger" was at anchor off Qui Nhon, Republic of Vietnam when plaintiff was arrested by the local police and charged with possession of marijuana cigarettes.

6. On October 14, 1972 plaintiff was interviewed by the Merchant Marine Detail Officer, Saigon.

7. From October 5, 1972 until October 13, 1972 he was incarcerated and was without benefit of counsel.

8. During that period he had minimal contact with anyone who spoke English and received no advice whatsoever. He was in a state of confusion and shock.

9. During the interview with Commander Newman, the Merchant Marine Detail Officer, Saigon on or about October 14, 1972 plaintiff was induced to voluntarily surrender his document while still in a state of confusion and shock.

10. Commander Newman did not provide plaintiff with a complete disclosure of the consequences of such surrender in violation of due process of law as required by the Fifth Amendment of the Constitution of the United States.

11. Commander Newman, in fact, misrepresented to plaintiff that he would return his document to him in the event he was freed by the Vietnamese judiciary.

12. Upon appearing in court Mr. Duarte did not have either counsel or competent English translation. He was fined but denies pleading either guilty or not guilty.

13. Plaintiff requested the Commandant of the United States Coast Guard to return his document and this request was refused on January 18, 1973 all to his damage in the sum of $9,500.00.

WHEREFORE, plaintiff prays for judgment in the amount of $9,500.00 together with counsel fees, interest and the costs and disbursements of this action and for such other and further relief as to the Court may seem just and proper in the premises.

ABRAHAM E. FREEDMAN
Attorney for Plaintiff

June 1975

By Edward M. Katz
Edward M. Katz
346 West 17th Street
New York, New York 10011

OPINION OF THE COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HERMAN DUARTE, :

Plaintiff, :

-against- : 73 Civ. 2461

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD, :

Defendants. :

- x

#42653

JUN 24 9 20 AM '75
S.D. OF N.Y.

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Plaintiff Duarte brought suit against the United States and the United States Coast Guard seeking to compel the return of his Merchant Mariner's Document and for damages during the period of its alleged unlawfully obtained surrender. Plaintiff and defendants filed motions for summary judgment. While these motions were pending, defendants agreed to return the document to plaintiff and did so on December 23, 1974. There are still pending, therefore, motions for summary judgment on plaintiff's claim for damages. In addition, defendants have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure ("F.R. Civ. P."). Defendants, in this latter motion, claim that this court is without jurisdiction over the complaint insofar as it asks for monetary damages against the United States.

Plaintiff originally alleged jurisdiction under the

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JUN 24 1975

Administrative Procedure Act, 5 U.S.C. §§702-706. Since it is not clear that this Act affords an independent grant of jurisdiction, see Aguayo v. Richardson, 473 F.2d 1090, 1101 (2d Cir. 1973) and, in any event, clearly does not provide for monetary relief, defendants have speculated that plaintiff might properly base jurisdiction upon 28 U.S.C. §1346(b), part of the Federal Tort Claims Act. Proceeding on this basis, defendants argue that plaintiff's case can not come within that section since two exceptions provided in 28 U.S.C. §2680-also part of the Federal Tort Claims Act-would apply to bar such a claim. We agree that if §1346(b) were the only applicable section, plaintiff's claim, which we believe has merit, would be barred by the rationale of Kiiskila v. United States, 466 F.2d 626 (7th Cir. 1972). In Kiiskila, the court held that the United States could not be sued under §1346(b) for damages for a federal officer's exercise of discretion, even if "constitutionally repugnant," because of the operation of 28 U.S.C. §2680(a). Plaintiff Duarte now specifies in a proposed amended complaint, however, that jurisdiction is predicated upon §1346(a)(2), which authorizes suits against the United States for damages not in excess of $10,000 "founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States...." Since plaintiff's action, alleging a fifth

amendment due process violation, is one "founded upon the constitution," cf. Bell v. Hood, 327 U.S. 678 (1946), and meets the jurisdictional limitation of $10,000 by claiming only $9,500, it is properly before us under 28 U.S.C. §1346(a)(2). Under that section, the exceptions of 28 U.S.C. §2680(a) do not apply. Cf. Coastwise Packet Co. v. United States, 277 F. Supp. 920, 924 (D. Mass. 1968), aff'd 398 F.2d 77, cert. denied 393 U.S. 937 (1968). We therefore deny defendants' motion for dismissal under Rule 12(c), F.R.Civ.P. for lack of subject matter jurisdiction. Thus, we must review the facts of the case and arguments on the motions for summary judgment in order to reach the merits of plaintiff's monetary claim.

In October 1972, plaintiff was serving as a messman aboard the S.S. American Challenger anchored off Qui Nhon, South Vietnam. On October 5, plaintiff went ashore and was arrested by the Binh Dinh Province National Police on charges of possession of four marijuana cigarettes. Plaintiff was confined to a jail from that date until October 13, 1972, when he was released and returned to the ship. During his confinement, he saw no one who spoke English except for a United States State Department representative shortly after his arrest. On the day that plaintiff was released, he was apparently advised initially that the narcotics charge against him had been dropped. However, he was later told that he would have to return to shore

to face trial in a South Vietnamese court on October 18, 1972.

In the meantime, while ashore on October 14, Commander Darwin W. Newman of the United States Coast Guard spoke with plaintiff, who thereafter signed a document entitled "voluntary surrender agreement" in preference to answering charges. By this agreement, plaintiff gave up his Merchant Mariner's Document in return for not having to answer misconduct charges at an administrative hearing pursuant to 46 U.S.C. §239. Thereafter on October 18, 1972, plaintiff finally appeared in the South Vietnamese court and was fined 5,000 piasters on the marijuana charge. Plaintiff was not represented by counsel at that proceeding.

Upon his return to the United States, plaintiff Duarte retained counsel with whose assistance he requested that the United States Coast Guard return his Merchant Mariner's Document. Upon the government's refusal to do so, plaintiff instituted this suit.

Defendants' papers in support of their motion for summary judgment, brought before plaintiff's document was returned to him, cite as controlling the case of Harris v. Smith, 418 F.2d 899 (2d Cir. 196). This court finds, however, that the facts of the two cases differ in important respects. In Harris, plaintiff seaman was aboard a ship docked in Brooklyn, New York. He was found in possession of marijuana during a border search, but the criminal charges brought against him were

dropped following a motion to suppress certain evidence. Thereafter, plaintiff was informed that an administrative hearing on the charges would be held by the Coast Guard on a specific date. In addition, plaintiff was advised that if he wished a hearing he would be entitled to counsel.[1/] Plaintiff, in lieu of that hearing, signed a voluntary surrender agreement apparently similar to the one signed by plaintiff Duarte in the instant case. Plaintiff then instituted a suit similar to the one before us and this court granted the government's motion for summary judgment, finding "no issue of compulsion or fraud." 1969 A.M.C. 1922 (S.D.N.Y. Metzner, J.). The Second Circuit, affirming the district court, held that plaintiff had voluntarily waived his right to an administrative hearing and that he did not have a constitutional right to advice of counsel prior to surrendering his Merchant Mariner's Document. The facts in the present case are significantly different in that plaintiff Duarte did not make such a voluntary waiver.

Plaintiff Duarte was stationed in South Vietnam and did not have counsel available to him at any time during the events detailed above. In Harris, plaintiff had been represented by counsel in the criminal proceedings brought against him which were subsequently dropped. He was, therefore, aware

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1/ The right to counsel here is given pursuant to a federal regulation. See 46 CFR §137.05-25(e)(2).

of the nature and seriousness of the activities with which he was charged both criminally and in the subsequent administrative proceeding. In addition, the Harris plaintiff was shown a copy of the charges, informed that a hearing was scheduled on a date certain, and finally informed of his right to counsel at that hearing. Under those circumstances, the Second Circuit was able to conclude that "Harris chose to waive a hearing concerning the charges after he was informed of his right to a hearing and the right to be represented by counsel at such a hearing....Since Harris was informed of the matter pending and could choose for himself whether to appear or default, contest or acquiesce, due process notice requirements were met." 418 F.2d at 901.

While plaintiff Duarte had a statutory right to a hearing on the alleged misconduct (46 U.S.C. §239), constitutional due process also requires such a hearing before the government can deprive plaintiff of his license. See e.g., Gibson v. Berryhill, 411 U.S. 564 (1973) (fourteenth amendment due process).

While such a due process right may be waived, the waiver should be "voluntary, knowing, and intelligently made, or an intentional relinquishment or abandonment of a known right or privilege." (citations omitted). D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-6 (1972) (assuming the standard for civil due process waiver is the same as in a criminal pro-

ceeding). Under the circumstances of the present case, we cannot find a knowing waiver. First, Duarte never had advice of counsel even for the charges lodged against him by the South Vietnamese government and was far away from home among non-English speaking people where he was less likely to be able to obtain any advice. Second, his alternative to signing the document surrendering his license, that is, the rights attendant to and possible consequences of a due process hearing were not made sufficiently clear to him. It is true Duarte was informed that, at some unspecified time, he would be entitled to a hearing on his alleged misconduct. It does not appear, however, that he was shown a copy of the charges or informed of the time or place for the hearing. See Armstrong v. Manso, 380 U.S. 545 (1965) (due process requires that a hearing be granted "at a meaningful time and in a meaningful manner"). Finally, Duarte was not informed that he would be entitled to counsel at that hearing or that the hearing officer would not be required to deprive plaintiff of his license even if he found that plaintiff had marijuana in his possession. 2/

2/ 46 C.F.R. 137.03-4 states that if the misconduct consists of possession, use, sale or association with marijuana, revocation of a Merchant Mariner's Document is mandatory. However, 46 C.F.R. 137-02-4 states: "In those cases involving marijuana, where the examiner is satisfied that the use, possession or association was the result of experimentation by the person and that the person has submitted satisfactory evidence that such use will not recur, he may enter an order less than revocation."

In Harris, although the Second Circuit did not find plaintiff had a right to counsel before making such a waiver, the court noted that

> [a]s a matter of administrative practice, it might be better to advise a licensed mariner to seek advice of counsel before taking so serious a step as surrender of his Document....

418 F.2d at 901. Especially in view of the fact that Duarte did not obtain counsel nor was he advised to do so, the government had an obligation to make certain that the agreement by which he waived his due process rights was entered into only after all the facts which could lead to a knowing waiver were made clear to him. Such was not the case here.

In addition to failing to inform plaintiff that he would be entitled to counsel if he should wish a hearing on the charges, the government did not inform plaintiff that the hearing officer could give Duarte a penalty less than document revocation even if he found that Duarte had marijuana in his possession as charged. It seems to us particularly relevant to a determination to waive a right that the party considering such a waiver know what the right entails and the possible consequences of exercising that right. See D. H. Overmyer Co. v. Frick Co., supra at 185-6.

The government in support of its contention that Duarte voluntarily surrendered his document directs the court to 46 C.F.R. §137.10-10, which states that a voluntary surrender

should not be accepted by the Investigating Officer unless he is convinced that the seaman is aware of what he is doing and the effect of his surrender. The affidavits of Commander Newman and Chief Donald G. Cooper both state that Duarte knew what he was doing when he surrendered his document and that it was a "voluntary" surrender. Those affidavits assert that plaintiff was read the surrender agreement and that "he took the time to read it himself before he signed it." All this evidence, however, even if taken as true for purposes of summary judgment, only tells us that Duarte knew that he was giving up his document, not that he had a sufficient understanding and knowledge of his right to a due process hearing and the nature and possible consequence of that hearing for purposes of making a knowing waiver.

To rebut Duarte's contention that he was unfamiliar with the nature of a Coast Guard hearing and his rights thereunder, the government points to an incident in 1951, 24 years ago, when Duarte was found in possession of marijuana and at which time his license was either suspended or revoked. Such an isolated occurrence so long ago is not sufficient to establish Duarte's familiarity with Coast Guard administrative procedures so as to warrant the inference that plaintiff's waiver of his due process rights was knowing and intentional.

Finally, in plaintiff's brief opposing defendants'

motion for summary judgment and in support of his similar motion, Duarte alleges that he was not "in a mental state to comprehend the meaning of the Voluntary Surrender Agreement...." Plaintiff claims that this issue alone requires a denial of defendants' motion for summary judgment. This contention is not well-founded. Summary judgment can still be granted, even though tangential factual issues are in dispute. See Pennsylvania R.R. v. Moore-McCormick Lines, Inc., 370 F.2d 430, 431(n.1) (2d Cir. 1966). Since we find that plaintiff did not make a knowing waiver in this case, it is unnecessary to have a trial on the issue of plaintiff's mental condition at the time he signed the agreement.

Having determined that there was a violation of due process in the procedure by which plaintiff surrendered his mariner's document, we now turn to the question of relief. The issue of the return to plaintiff of his document has already been mooted by its voluntary return. Plaintiff claims damages, however, for loss of earnings during the two-year period he was unable to work as a merchant seaman. The question thus arises whether plaintiff can claim monetary damages for a fifth amendment violation. The Supreme Court has held that a claim for damages may arise under the fourth amendment. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The rationale supporting the Bivens decision

might well lead a court to find that damages should lie for a violation of the fifth amendment as well. Cf. Bell v. Hood, 327 U.S. 678 (1946); City of Kenosha v. Bruno, 412 U.S. 507, 516 (concurring opinion of Brennan, J.); Singleton v. Vance County Bd. of Ed., 501 F.2d 429 (4th Cir. 1974) ("tentative" finding of right to monetary relief for fourteenth amendment due process violation). See also Cardinale v. Washington Technical Institute, 500 F.2d 791, 796 n.5 (D.C. Cir. 1974) (court declined to reach question after determining a jurisdictional issue).

Nevertheless, we find it unnecessary to decide the issue here, since there is a defect fatal to plaintiff's action even if we were to hold that monetary damages were an available remedy. On remand in Bivens, the Second Circuit found that if a federal officer could show that he acted in good faith and with a reasonable belief in the validity of the arrest and search then he would have a valid defense to a suit for damages. Bivens v. Six Named Unknown Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972). That defense has been accepted by other circuits as well. See e.g., Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974). Here, where plaintiff has failed to allege bad faith on the part of the defendants, and where affidavits of the two Coast Guard officers who were involved in obtaining the "voluntary surrender" attest to their good faith belief in the propriety and voluntariness of the surrender,

we cannot say that defendants should be liable for monetary damages. Therefore, we grant defendants' motion for summary judgment and deny plaintiff's request for damages.

SO ORDERED.

Charles E. Stewart Jr.
United States District Judge

Dated: New York, N. Y.
June 23 , 1975.

U.S. DISTRICT COURT
FILED
JUN 30 1975
S.D. OF N.Y.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DURATE

Plaintiff : 73 Civil 2461 (CES)

-against-

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD : JUDGMENT

Defendants

Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the motion having come on to be heard before the Honorable Charles E. Stewart, United States District Judge, and the Court thereafter on June 24, 1975, having handed down its memorandum opinion denying plaintiff's request for damages, and granting defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants UNITED STATES OF AMERICA and UNITED STATES COAST GUARD, have judgment against plaintiff HERMAN DURATE, dismissing the complaint.

Dated: New York, N.Y.
June 30, 1975

Raymond F. Burghardt
Clerk

MICROFILM
JUN 30 1975

Index No. Year 197

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMAN DUARTE,

Plaintiff,

-against-

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,

Defendants

NOTICE OF MOTION
AFFIDAVIT
MEMORANDUM OF LAW

ABRAHAM E. FREEDMAN
Attorney for Plaintiff

Office and Post Office Address, Telephone
346 WEST 17TH STREET
NEW YORK, N. Y. 10011
929-8410

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

U.S. DISTRICT COURT
FILED
SEP 9 1975
S.D. OF N.Y.

Plaintiff's motion to reconsider its decision is granted. Upon reconsideration, however, we adhere to our original decision of June 24, 1975.

SO ORDERED.

U.S.D.J.

September 8, 1975

SEP 9 1975

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Memorandum

61A

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
8 4 19 PM '75
S.D. OF N.Y.

5 02/Bl.

HERMAN DUARTE,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA
and THE UNITED STATES COAST GUARD,

Defendants.

NOTICE OF APPEAL

73 Civ. 2461 (CES)

PLEASE TAKE NOTICE that the plaintiff, Herman Duarte, hereby appeals to the U.S. Court of Appeal 2nd Circuit from a decision and order of the United States District Court, Charles E. Stewart, J. entered on June 24, 1975 and from the order on reconsideration adhering to its original decision entered on September 9, 1975.

Respectfully submitted,

ABRAHAM E. FREEDMAN

By [signature]
Attorney for Plaintiff
346 West 17th Street
New York, New York 10011

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TO:
CLERK OF THE DISTRICT COURT
Foley Square
New York, New York 10007

Letter sent
ISSUED
C+D
10/8/75

To be served U.S. Department [illegible]
Shipping [illegible]

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMAN DUARTE,

Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA and THE UNITED STATES COAST GUARD,

Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 10th *day of* December *19* 75, *deponent served the annexed* Joint Appendix

upon John M. Rogers *attorney(s) for* Defendant-s-Appellees *in this action, at*

Appellate Section, Civil Division, Room 3643
U.S. Department of Justice
Washington, D.C. 20530

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 10th *day of* December *19* 75

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 197